

DEPARTMENT OF TRANSPORTATION
BOARD FOR CORRECTION OF MILITARY RECORDS

Application for Correction of
Coast Guard Record of:

BCMR Docket
No. 1999-018

FINAL DECISION

[REDACTED]

This is a proceeding under the provisions of section 1552 of title 10 and section 425 of title 14, United States Code. It was docketed on November 6, 1998, upon the BCMR's receipt of the applicant's complete application for correction of his military record.

This final decision, dated September 23, 1999, is signed by the three duly appointed members who were designated to serve as the Board in this case.

The applicant, a lieutenant commander (LCDR) on active duty, asked the Board to correct his record by modifying three officer evaluation reports (OERs) for the periods from July 31, 1992 to May 31, 1993 (first disputed OER), June 1, 1993 to April 30, 1994 (second disputed OER), and from May 1, 1994 to April 30, 1995 (third disputed OER). The applicant asked to have his 1997 and 1998 failures of selection for promotion to commander (CDR) removed from his record.

EXCERPTS FROM RECORD AND SUBMISSIONS

The applicant is a law specialist. During the periods covered by the disputed OERs, he was assigned to duty as a staff attorney [REDACTED]. The applicant alleged that certain comments on the disputed OERs violate Article 10-A-4g.(2) of the Personnel Manual. This provision stated as follows:

Duty as a member of a court-martial will not be considered or mentioned. A Reported-on officer shall not be given a less favorable evaluation because of the zeal with which he or she, as counsel, represented any accused before a court-martial. . . . This is not intended to preclude the accurate evaluation of, and comment on, counsels' advocacy skills . . . displayed in a court-martial setting. However, in commenting on such performance, whether favorable or unfavorable, no reference will be made to the final result (acquittal, conviction, or sentence).

First Disputed OER

The applicant requested that the underlined comments in the section below be deleted from block 3h. of the first disputed OER:

[D]efended 17 court-martials & 22 admin boards with thoroughly prepared legal defenses leading to excellent professional results in each case. . . . Used resources very effectively; his excellent research on suspects' rights entitlements led to modification of office's attorney detailing practices & to necessary [change] in resources used for that purpose . . . Results far exceeded expectations; ability to independently get results led to his selection to represent USN defendants in high viz "Tailhook" cases + USN homosexual officer separation case + officer suspected of grounding vessel; . . .

The applicant also asked to have the word "another" substituted for the words "officer homosexual" in the following sentence, in block 6.c.: "in officer homosexual case he fielded calls from 'Nightline' TV & 'Wash. Post.' "

Second Disputed OER

The applicant requested that the underlined portions in the following paragraph be deleted from block 3.h. the second disputed OER:

Always very well prepared. Defended 41 court-martial clients without requesting a single continuance. Meticulous trial preparation evident in results obtained. e.g. "cornered" witness on cross examination exposing lies & acquitting client. Excellent manager/planner of lawyers & funds used to provide area-wide defense services. . . . Successfully defended USN "Tailhook" cases forming informal coalitions with civilian lawyers & skillfully using media to gain leverage. Result far surpassed expectations. . . . Extraordinary law specialist; innovative thinker; requested by USN to help with their cases, working high-viz homosexual discharge case for USN; . . .

The applicant requested the following underlined portions be deleted from paragraph 9.f.

[D]uring unprecedented & complex series of USN "Tailhook" prosecutions was leader developing & innovative defense strategies-stunningly successful. . . . Did high-profile battle with "the system" in a way that retained respect of the sr officers who were his legal opponents. Uncompromising integrity; . . .

The applicant also requested that the phrase in block 9.f. "Agreed to handle high-profile USN officer case" be substituted for the phrase "Agreed to handle high-profile legal battle between homosexual officer & USN."

Attached to the second disputed OER was a citation to accompany a Navy Achievement Medal. The applicant requested that the citation be amended in the following particulars: Substitute the words "officer general court-martial" for the phrase "[REDACTED]". He further requested the sentence -- "He further developed evidence that resulted in the court disqualifying the staff judge advocate, ordering new Article 34 advice, and eventually to the convening authority deciding not to go forward on the charges" -- be amended to read-- "He further developed evidence that resulted in the court disqualifying the staff judge advocate and ordering new Article 34 advice."

Third Disputed OER

The applicant requested that the underlined phrase be deleted from the following excerpt taken from block 3h. in the third disputed OER: "Achieved excellent results through thorough prep and research of fact and standard. Recognized as a military justice expert throughout the CG."

The applicant claimed that the above underlined comments, while laudatory, violate the Personnel Manual, which expressly forbids any reference to the results of a court-martial. He stated that in addition, "the reference to 'Tailhook' violates the separate prohibition on reference to specific cases."

Removal of Failures of Selection

The applicant stated that the analysis of the existence of a nexus between the alleged errors and the failures to be selected for promotion required a two-step evaluation: (1) would the officer's record have been stronger if it had been correctly constituted, and (2) would the officer have been passed over in any event. Frizelle v. Slater, 111 F.3d 172 (D.C. Cir. 1997). The applicant, citing Engels v. United States, 230 Ct. Cl. 465, 678 F.2d 173, 175 (1982), argued that the Coast Guard has the burden of proof on this issue.

With respect to the first prong of the nexus evaluation, the applicant argued, that although these OERs are not adverse and are wonderful reports, the issue is "if they had not included the comments that violated the Personnel Manual, [the applicant's] PDR would have been stronger when he came before the [CDR] promotion boards in 1997 and 1998."

The applicant claimed that the applicant may have suffered prejudiced before the 1997 and 1998 selections board because of his duty as a defense counsel. He stated that that loyalty in the armed forces is paramount and the defense function, by its nature appears to be inconsistent with this standard, particularly since a defense counsel may

create animosity by the hard blows that is sometimes required in the performance of the job.

The applicant stated that the concern of "defense counsel versus management" is demonstrated in the OERs, particularly the second disputed OER by the comment "[d]id high-profile battle with 'the system'", albeit "in a way that retained respect of the [senior] officers who were his legal opponents." The applicant stated that comments, such as this one, even though intended to be admiring, are plainly hazardous in a promotion system and culture like the Coast Guard's since they suggest an "us against them" array, in which the "us" controls promotions. The applicant stated that this perception is especially worrisome in this case because the selections boards included no attorneys who could help explain the unique role of defense counsel.

The applicant stated that one of the members (a CDR) of the 1997 CDR selection board (before which the applicant had his better chance of being promoted) had previously expressed to the applicant views that indicated this CDR's basic hostility to the applicant's role as a defense counsel. In 1994, the applicant represented a petty officer before an administrative discharge board (ADB) for use of marijuana. He requested that the CDR, who was the petty officer's executive officer at the time, approve a witness request for the petty officer's polygraph operator to come and testify before the ADB. The applicant stated that during that conversation the CDR asked him "how do you handle the ethical conflict between being a Coast Guard officer and defending a drug user?" The applicant replied that there was no conflict and that his duty was to his client. The applicant argued that the fact that a senior officer could even ask such a question demonstrates the lack of understanding on the part of other Coast Guard officers with respect to a defense counsel's duties.

The applicant asserted that this CDR should have recused himself from the 1997 CDR selection board. The applicant stated that the circumstances he has presented highlight the toxic effect the disputed comments can have before a promotion board. He stated that as the BCMR has observed in the past, evil most often lies in the eye of the beholder. The applicant further stated that given the question that the CDR felt impelled to ask, the BCMR cannot simply dismiss the notion that OER comments, such as those at issue, are harmful.

The applicant stated that by needlessly detailing matters like the applicant's representation of client's involved in "Tailhook," or the applicant's representation homosexuals, the OERs touched on highly charged matters and created a real danger that selection board members' personal views on these controversial issues would come into play. The applicant stated that the inclusion of the disputed comments was prejudicial. He alleged that the removal of the disputed comments would make his record stronger.

With respect to the second prong of the nexus analysis, the applicant stated that there is no way to be certain whether any individual would or would not have been selected for promotion if their PDR had been constituted in a different manner. The applicant stated that it is pertinent that the selection rate for the 1997 CDR selection

board was approximately 67% for within-the-zone officers like himself. The applicant argued that with a selection rate of 67%, he would not have been precluded from selection solely because of stiff competition..

The applicant stated that the Coast Guard has refused to release its data on the distribution of OER marks. According to the applicant, without such data, the Coast Guard cannot carry its burden of showing that an officer with OERs like the applicant's would not have been promoted in any event. He further stated that without the data of the relative standing of the other officers who were considered by the promotion board with the applicant, there is no reliable way for the BCMR to make a determination whether, under the "best qualified" criterion, which the promotion board had to apply, the applicant would have been passed over in any event.

The applicant submitted copies of two e-mails that his reporting officer wrote to Coast Guard Headquarters expressing concern that the applicant, as well as several other officers, had not been selected for promotion, particularly before the 1997 Board. The reporting officer stated that the applicant was the only LCDR that he had recommended for early selection for promotion to CDR. He also expressed his concern that there might have been some members with an anti-defense bias on the selection board. The reporting officer stated that "four of the officers [at his unit] who failed selection ... had recent experience with their primary duty being a defense counsel."

In addition to the e-mails, the applicant also submitted a copy of the regulation, copies of the ALDISTs announcing the CDR selectees for 1997 and 1998, a copy of the precept for the 1997 board, a copy of the witness request for the polygraph operator, and a copy of the CDR's response denying that witness request.

Applicant's OERs

The applicant's performance as a LCDR is consistently rated above average, with mostly 6s and some 7s (on a scale of 1 to 7), and an occasional 5 in areas like collateral duty/administrative expertise, evaluations and health and well being. Once early in his LCDR career, he received a 4 in the category preparing and submitting evaluations on subordinates. In block 12 on his LCDR OERs, he has received the following marks, 6, 6, 6, 6, 5, and 5. On the OER that was just recently prepared, the applicant received 6s and 7s, except for a 5, in evaluations. He was given a 6 in block 12. The comments on all of his LCDR OERs were positive and most complimentary.

The applicant's performance as a LT was above average. He did receive an occasional 4 in areas like collateral duties/administrative expertise and evaluations. He attended law school while holding the rank of LT and received several non-observed duty under instruction (DUNIS) OERs. Also, he received several OERs while serving as a law intern during summer breaks from law school. His block 12 marks on his LT OERs were 5, 6, 5, 6, 5, 6, and 6.

The applicant's OERs as a LTJG were excellent. His block 12 marks were 6, 7, 7, 7, 7, 5, and 5. As an ensign his block 12 marks were 5, 4, 4, and 4.

Views of the Coast Guard

On August 19, 1999, the Board received an advisory opinion from the Chief Counsel of the Coast Guard. He recommended that the phrase "& acquitting client" be removed from section 3h. of the second disputed OER. The Chief Counsel recommended that the language in the Achievement Medal citation referring to the final result of a court-martial and the language referring to sexual orientation be expunged from that document. Although the references to sexual orientation in the disputed OERs were not a violation of the Personnel Manual at the time the OERs were submitted, the Chief Counsel stated that the Coast Guard would have no objection to any decision to expunge them from the applicant's record, since they might identify a specific case. The naming of a specific case is prohibited under the current regulation.

The Chief Counsel recommended that all other relief be denied. In this regard, the Chief Counsel stated that the applicant has failed to prove that the other challenged laudatory comments were in error or unjust.

The Chief Counsel stated that the comments alluded to the applicant's trial performance and were permissible under the regulation. He noted that the applicant did not challenge the accuracy of the comments, but only alleged that they violated the regulation. The Chief Counsel denied that any of the comments referred to the "final results" of any trials where the applicant had served as trial counsel. According to the Chief Counsel, the comments, even including the term "results," referred to the high caliber of the applicant's performance as trial counsel. The Chief Counsel stated that the challenged comments comply with the intent of the regulation, which is to allow as much comment as necessary to objectively document the skill of the attorney-officer, without specifically grading the officer on the outcome of a trial.

The Chief Counsel stated that the applicant has not presented any statute or regulation that required the CDR to recuse himself from the 1997 CDR selection board, nor has the applicant presented sufficient evidence that the CDR was prejudiced against him. The Chief Counsel noted that the CDR denied, in an affidavit attached to the advisory opinion, that he had any prejudice against the applicant. The CDR, in fact, stated that he "had no recollection of [the applicant] at all in 1997 when [he] was a member of the [CDR] promotion board." The Chief Counsel stated that in the absence of clear, cogent, and convincing evidence to overcome the presumption of regularity that the military officials involved in this case discharged their duties correctly, lawfully, and in good faith, the Board should dismiss this allegation as unsupported.

Attached to the views of the Coast Guard, was a memorandum from Commander, Coast Guard Personnel Command (CGPC). He commented on the existence of a nexus between the recommended relief and the removal of the applicant's failures of selection for promotion. CGPC stated that the limited relief recommended by the Coast Guard would not constitute a nexus to the applicant's non-selection. He stated that those comments describe the applicant in a favorable light. CGPC stated

that if the Board grants all the relief requested by the applicant, a nexus could exist between the contested comments and his non-selection to the higher grade.

Applicant's Response to the Views of the Coast Guard

On September 7, 1999, the Board received the applicant's response to the views of the Coast Guard. The applicant informed the Board that he had been selected for promotion to CDR by the 1999 selection board. The applicant stated that an attorney-officer served on the most recent CDR selection board. He stated that he had contended all along

that the inappropriate OER comments, combined with the lack of an attorney on the previous two selections boards, operated to [his] extreme detriment . . . in that the board members were likely to misconstrue his efforts as defense counsel. The fact that [I have] now been selected lends weight to [my] contention that the composition of prior boards worked to [my] detriment.

The applicant stated that even though the Coast Guard quibbles about the extent of any record correction, the Chief Counsel admits that the disputed OERs contain prohibited and inappropriate remarks. The applicant stated that any of the requested changes, even if confined to those which the Coast Guard agrees, would improve the OER. The applicant argued that given the role that OERs play in the promotion process, the nexus between the alleged error and his passovers is clear. He stated that the Coast Guard has not met its burden that he would not have been promoted in any event.

SELECTED PROMOTION BOARD REGULATION

Selection for promotion to CDR on active duty is made on a best qualified basis. Article 14-A-1c. of the Personnel Manual states in a best-qualified system the selection board is limited to a specific number it may select and makes its selection by comparing each officer to all others considered.

Article 14-A-3.a. speaks to selection criteria. Specifically it states the following:

1. Personnel boards recommend on either a best-qualified or fully-qualified basis as set forth in law and directed in the precept. . . . [E]ach board develops its own overall standards and selection criteria. The degree of significance a board assigns to each of the many factors it considers may vary according to the grade and type of selection the board is making. A board selecting officers for lieutenant may emphasize different factors than would a Captain Continuation Board.

Section 14-A-3.b. lists the following basic criteria to be applied by selection boards: performance evaluations, professionalism, leadership, and education.

Article 14-A-4d. of the Personnel Manual states that "[a] board must consider an officer's entire record; however, the following is considered most significant portion of the record evaluated:

Grade Considered	Service period.
... Commander	seven years of immediate previous service or all service in present grade, whichever is greater."

PRECEPT FOR THE 1997 CDR SELECTION BOARD

In a precept dated July 22, 1997, the Commandant provided the following guidance, in part, to the seven member 1997 CDR selection board:

"2. Members of the Board shall swear or affirm that they will, without prejudice or partiality, and having in view both the special fitness of officers and the efficiency of the Coast Guard, perform the duties imposed upon them.

"3. There is hereby established a promotion zone of 168 lieutenant commanders on the Active Duty Promotion List consisting of the most senior officers in the grade of lieutenant commander; namely [a certain lieutenant commander] and those 167 officers junior thereto who have not been previously included in a promotion zone, through and including [a certain lieutenant commander]. There are 126 officers above the zone and 187 eligible officers below the zone. The names and records of all officers to be considered for promotion shall be furnished to the Board. The 120 best qualified officers shall be recommended for promotion. If considered best qualified, not more than 9 officers below the zone may be among those selected.

* * *

"5. [M]embers should be reminded that in the process of their evaluation they must confine themselves to facts of record and may not predicate judgments on rumor or hearsay."

FINDINGS AND CONCLUSIONS

The Board makes the following findings and conclusions on the basis of the applicant's submissions and military record, the Coast Guard's submission, and applicable law:

1. The Board has jurisdiction of this case pursuant to section 1552 of title 10, United States Code. It was timely, pursuant to Detweiler v. Pena, 38 F.3d 591 (D.C. Cir. 1994).

2. The Board concurs in the Chairman's determination that the application can be decided without a hearing. 33 CFR § 52.31 (1993).

3. Except for the comment—" & acquitting client" – in the second disputed OER and the references to the final result of a court-martial in the Navy Achievement citation, the Board finds that the other challenged comments are not in error. Although the Coast Guard had no objection to the removal of the homosexual references since they could possibly identify a specific case, such references were not in violation of the Personnel Manual at the time, and would not have been, at that time, even if the specific case could have been identified. Neither of the three disputed OERs place the applicant in an unfavorable light, even with the comment " & acquitting client" and the references to his homosexual clients. In fact, the OERs are more than favorable and speak in very complimentary tones about the applicant's preparation for trial, his trial skills, his stamina, and his supervisory skills. The applicant has not shown that the remainder of the comments violate the Personnel Manual by referring to the final outcome of a court-martial. Neither has the applicant alleged or shown that he was given less favorable OERs because of the zeal with which he performed his attorney duties.

4. The Board finds that the comment " & acquitting client" should be removed because it refers to the outcome of a case and the references to sexual orientation should be removed because the applicant requested it and the Coast Guard did not object to removing the references. Also, the Board finds that the comments that refer to the final outcome of a court-martial contained in the Navy Achievement citation should be removed from that document.

5. The applicant has not shown by a preponderance of the evidence that a CDR who served as a member of the 1997 CDR selection board was biased against him and should have recused himself from serving on that board. The only evidence offered by the applicant that this officer might have harbored a bias against him was a conversation between the two of them in 1994. In that conversation, the CDR allegedly asked the applicant about an ethical conflict between being a Coast Guard officer and defending an alleged drug user. Without something more in the way of evidence that establishes that the CDR had a bias against the applicant, particularly at the time he served on the selection board, the Board cannot find that the applicant has demonstrated by a preponderance of the evidence that the CDR was biased against the applicant.

6. For the CDR, who served on the 1997 CDR selection board, to do other than to select those individuals for promotion based on their records would have been to violate his oath as a member of that selection board. The CDR took an oath that he would perform his duties without prejudice or partiality. It is presumed that the CDR, as a member of the selection board, followed the directions of the Commandant in performing his duties. The applicant has not presented sufficient evidence to rebut this presumption of regularity.

7. With respect to the removal of the applicant's failures of selection for promotion, the applicant must establish a causal connection between the errors found

by the Board in the disputed OERs and his failures of selection for promotion to CDR before the 1997 and 1998 CDR selection boards. In determining whether a nexus exists between the errors or injustices and the applicant's failures of selection, the Board applies the standards set forth in Engels v. United States, 230 Ct. Cl. 465 (1982).

In Engels, the United States Court of Claims established two "separate but interrelated standards" to determine the issue of nexus. The standards are as follows: "First, was the claimant's record prejudiced by the errors in the sense that the record appears worse than it would in the absence of the errors? Second, even if there was some such prejudice, is it unlikely that he would have been promoted in any event?" Engels at 470.

8. Applying the first prong of the Engels test to the applicant's record, the Board finds that the applicant's record does not appear worse than it would in the absence of the alleged errors. With or without the erroneous comments, the applicant's record appears virtually the same. For example, in the sentence to be corrected, the original version read "[m]eticulous trial preparation evident in result obtained, e.g. 'cornered' witness on cross examination exposing lies & acquitting client." The corrected version will read "[m]eticulous trial preparation evident in result obtained, e.g. 'cornered' witness on cross examination exposing lies." If anything under the circumstances of this case, the phrase "acquitting client" adds emphasis to the applicant's excellence performance as an attorney. While use of the term "& acquitting client" may have been used in violation of the Personnel Manual, its use under these circumstances is harmless.

9. The Coast Guard has recommended the removal of the term "homosexual" from the disputed OERs, although the use of the term in OERs was not prohibited by the Personnel Manual, at the time, even if it identified a specific case. Since the Coast Guard has recommended the removal of that term and the Board has agreed that it should be removed, the Board must determine whether the applicant's record appears better with the references to sexual orientation deleted from the disputed OERs. For an example, does this sentence - "[e]xtraordinary law specialist; innovative thinker; requested by USN to help with their cases, working high-viz homosexual discharge case for USN"—appear better or stronger if it were reworded to read - extraordinary law specialist; innovative thinker; requested by USN to help with their cases? The Board finds that deleting the references to sexual orientation to be cosmetic and does not cause the applicant's record to appear better.

10. The applicant would argue that the controversy surrounding homosexuals in the military and that which surrounded the "tailhook" incident are highly charged issues within the Coast Guard and the referral to them in his OERs prejudiced him before the 1997 and 1998 CDR selection boards. However, the applicant has not presented a preponderance of evidence showing that any member of the 1997 or 1998 CDR selection board was biased against him because his work dictated that he defend clients allegedly involved in these areas.


11. The Court made it clear in Hary v. United States, 618 F. 2d 704, 709 (1980) that the mere establishing of an error in the record does not automatically obligate the BCMR to remove a failure of selection. The Court stated that the "the officer must show that the presence of the defective OER made his whole record before the selection board something less than 'substantially complete and fair'." The Board does not find that deleting the phrase "& acquitting client" from the second disputed OER or similar phrases from the Navy Achievement citation or removing the reference to sexual orientation causes the applicant's whole record, which is excellent, to be less than "substantially complete and fair".

12. In this regard, the Board finds that the applicant's record before the 1997 and 1998 selection boards was complete containing all of his OERs and awards. His performance was above average from the rank of ensign through his LCDR years. As stated above the disputed OER were very complimentary to the applicant even when considered with the prohibited comments. By mentioning the acquittal and the high visibility cases the applicant handled, the OERs clearly demonstrate the applicant's excellent performance as a trial advocate. The applicant has not demonstrated that his record appeared worse by containing the references to an acquittal or to sexual orientation.

13. Even if the applicant could show some prejudice and the applicant satisfied the first prong of the Engels test, the Board finds that the applicant would not have been promoted in any event in 1997 or 1998. The Board finds that the applicant's record before the 1997 and 1998 CDR selection boards was substantially complete and depicted his performance in a fair and equitable manner. The fact that the applicant was selected for promotion in 1999 with all of the challenged comments in his record supports the Board's conclusion that the applicant was simply not going to be promoted by the 1997 or 1998 selections boards. Since the selection board's deliberations are secret, there is no way to determine with certainty why the applicant was not selected, but the Board is persuaded that his passovers were not for the reasons stated by the applicant in this petition.

14. Accordingly, the applicant should be granted the relief as discussed above.

ORDER

The application of  USCG, for correction of his military record is granted, in part. His record shall be corrected as follows:

1. Block 6c. of the OER for the period July 31, 1992 to May 31, 1993 shall be corrected by inserting the word "another" for the words "officer homosexual."

2. Block 3h. of the OER for the period June 1, 1993 to April 30, 1994, shall be corrected by deleting from the second sentence the phrase "& acquitted client" and by deleting from the last sentence the phrase "working high-viz homosexual discharge case for USN."

Block 9f. of this same OER shall be corrected by inserting the word officer for the word homosexual in the following sentence: "Agreed to handle high-profile legal battle between homosexual officer & USN."

The third sentence of the Navy Achievement citation attached to the second disputed OER shall be corrected to read: He further developed evidence that resulted in the court disqualifying the staff judge advocate and ordering new Article 34 advice.

All other requests for relief are denied.

